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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-972

GEOFFREY HONNEUS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Geoffrey Honneus, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on December 24, 1974.

Citations to Opinion Below

The opinion of the Court of Appeals is not yet published. A copy of the opinion is attached hereto as Appendix A.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on December 24, 1974. (Appendix B) On January 23, 1975, Mr. Justice Brennan extended time for filing this petition to and including February 6, 1975. (Appendix C) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the court below erred in ruling that, although 21 U.S.C. § 802 defines "marihuana" as Cannabis sativa L., it should be interpreted as including other species of Cannabis, such as Cannabis indica and Cannabis ruderalis, thereby following three other Circuits, but conflicting with the District of Columbia Superior Court, and two other Federal District Courts?

2. Was petitioner denied due process of law, and the right to confront his accusers, when the trial court refused to permit him to cross-examine one accomplice-witness concerning that witness' attempt to elicit a bribe from petitioner, and refused to permit him to cross-examine a second accomplice-witness concerning that witness' history of mental illness?

Statutory Provisions Involved

21 U.S.C. § 802. Definitions as used in this subchapter:

(15) The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such

plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 812

* * *

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

* * *

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

* * *

(10) Marihuana

* * *

21 U.S.C. § 841. Prohibited acts A — Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

* * *

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub. L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.

* * *

21 U.S.C. § 952. Importation of controlled substances—substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customers territory of the United States from any place outside thereof (but within the United States), or to import into

the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that —

* * *

21 U.S.C. § 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. Pub. L. 91-513, Title III, § 1013, Oct. 27, 1970, 84 Stat. 1291.

* * *

26 U.S.C. § 4761. Definitions

When used in this part—

(1) Person.—The term "person" means an individual, a partnership, trust, association, company, or corporation, and includes an officer or employee of a trust, association, company, or corporation, or a member or employee of a partnership, who, as such officer, employee, or member, is under a duty to perform any act in respect of which any violation of this part occurs.

(2) Marihuana.—The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, deri-

vative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(3) Producer.—The term "producer" means any person who (A) plants, cultivates, or in any way facilitates the natural growth of marihuana; or (B) harvests and transfers or makes use of marihuana.

(4) Transfer or transferred.—The term "transfer" or "transferred" means any type of disposition resulting in a change of possession, but shall not include a transfer to a common carrier for the purpose of transporting marihuana.

Aug. 16, 1954, c. 736, 68A Stat. 565.

Statement of the Case

On June 20, 1973, a Federal Grand Jury returned an indictment in six counts against Geoffrey Honneus and five others alleging that they conspired to import (Count One), distribute and possess with intent to distribute (Count Three), and smuggle (Count Five) marihuana; and alleging that they did import (Count Two), distribute and possess with intent to distribute (Count Four), and smuggle (Count Six) marihuana. (R. 4-12)

The conspiracies and substantive offenses were alleged to have taken place from March 1, 1972 to September 1, 1972, at Cambridge, Duxbury, Boston, Weymouth, Provincetown and Truro, Massachusetts (Counts One, Three, Five), Martha's Vineyard, Massachusetts and Casco Bay, Maine (Count Six), and Maine (Count Two). There was no allegation of location in Count Four. Each of the conspiracy counts alleged the same sixteen overt acts.

On June 22, 1973, defendant Honneus pleaded Not Guilty, and subsequently filed various pre-trial motions. Trial

began on February 26, 1974, and there was evidence presented from which the jury could have found the following facts:

In April of 1972, Robert Puffer, a yacht captain and owner of the vessel *Mercury,* met Geoffrey Honneus and Judith and David Dugdale at the Dugdales' apartment in Cambridge. (Tr. 1-14 to 17) Honneus told the others that he was planning to charter a vessel from Florida to pick up marihuana in Jamaica and return to Maine. He showed them a picture of the vessel, and Puffer and the Dugdales all commented that it was unsuitable. Honneus then inquired whether Puffer's boat would be available. Puffer replied that he would think about it. A few days later, Puffer agreed, and a fee for the charter was set. Honneus told Puffer that Arthur Davey would contact him shortly. (Tr. 1-17 to 18)

During the second week in May, Honneus met with Richard Thurlow in Truro, Massachusetts, and Thurlow agreed to go with Honneus to Jamaica to introduce him to people from whom he could purchase large quantities of marihuana. (Tr. 1-91 to 92)

At some time in early May or late April, Davey met with Puffer and the Dugdales, and they divided the responsibility for provisioning the vessel. (Tr. 1-19) During May, 1972, the vessel was provisioned for the trip at Duxbury Harbor. On May 24, 1972, the crew, consisting of Richard Gray, Michael Erving, William Helliesen and David Dugdale came aboard, and the vessel left for Florida. (Tr. 1-22, 2-16)

The vessel arrived at West Palm Beach, Florida, on or about the evening of June 4, 1972. The following day, Davey and Richard Thurlow came aboard. Davey presented a chart showing the eventual off-loading point off the coast of Maine. (Tr. 1-28)

Later that evening Honneus and William Rowe arrived. Honneus told Puffer he was to fly to Jamaica the next day to survey the intended pick-up site, and he left several pieces of colored lens paper to be used as signalling devices. The following morning, Thurlow, Honneus, Rowe and Puffer flew to Jamaica. (Tr. 1-32 to 34)

At Runaway Bay, Jamaica, Thurlow met with Sal Black, obtained a sample of a substance alleged to be marihuana from him and arranged to meet him that evening. That evening Honneus, Rowe and Thurlow met Black and drove to Bamboo, where they met with Capo, obtained a sample from him, discussed amounts and price of a purchase and arrangements for transportation of the material (Tr. 1-100 to 104)

The following morning, Thurlow, Rowe and Puffer went with Sal Black in a small boat to familiarize Puffer with the prospective landing sights. (Tr. 1-35, 104 to 105) That afternoon, Rowe, Thurlow, Honneus, and Black met with Vernon in another town in Jamaica, obtained a sample and discussed price. That evening, they returned to Capo's house in Bamboo, where Honneus gave Capo a $10,000 downpayment towards the purchase of the material. They then took Puffer to the airport for his return to Florida (Tr. 1-35), and proceeded to John's Hall, Jamaica, where they met with Olivera MacBean and arranged to get a quantity of marihuana for which Thurlow had already paid $5,000. (Tr. 1-105 to 107) Thurlow then returned to Boston, Massachusetts, after arranging to meet Davey in Boston to be paid off. (Tr. 1-108)

The following day, Puffer, Helliesen and Gray set sail for Jamaica aboard the Mercury. (Tr. 1-36, 2-19) On June 14, they dropped anchor at Runaway Bay. Black and Honneus came out to meet them in a boat. Loading of the material was delayed, since the original shipment had been stolen. Eventually, about fifteen gunny sacks were

loaded on board, each weighing about seventy-five pounds. The vessel then left and stood off Jamaica, returning the next night to load about thirty twenty-five pound packages wrapped in white newsprint with masking tape. The vessel then left Jamaica for the United States, with Puffer, Gray, Helliesen and Rowe aboard. (Tr. 1-37 to 41, 2-19 to 22)

The Mercury proceeded to Oak Bluffs, Martha's Vineyard, Massachusetts, where it put in for re-fueling. Puffer contacted Honneus in Truro to announce the arrival and to arrange a meeting in Maine, and then proceeded to Casco Bay, Maine, arriving the following morning. (Tr. 1-42 to 44, 2-23 to 24) The following day, they met a boat containing Robert Billock, Davey, and Douglas Yankauer, and transferred the load to that boat. (Tr. 1-44 to 45, 2-24)

Subsequently, Helliesen met with Honneus at his home in Truro on a number of occasions. Honneus paid him for the trip, and said he was getting the money from the sale of marihuana in the Boston area. Helliesen also received some material that Honneus said came from the Jamaican trip. (Tr. 2-28 to 33) Puffer was paid by Davey and Honneus, who told him the "grass" had to be sold before he was paid. Honneus gave him some material which he said was brought from Jamaica. (Tr. 1-48 to 50) Thurlow was paid by Honneus and Davey and also received some alleged marihuana. (Tr. 1-108 to 114)

No expert testimony was presented to establish the material as marihuana, and none of the substance was available. It was identified as marihuana solely through the testimony of the witnesses Puffer, Helliesen and Thurlow that the material was greenish-brown vegetable matter that looked like marihuana.

The jury returned verdicts of guilty against Honneus on all counts. (Tr. 3-88) Subsequently, the trial court, on motion of petitioner, dismissed Count Six. (R. 3) Hon-

neus was sentenced to serve 5 years' imprisonment on each count, the sentences on Counts Three and Five to run concurrently with Count One, the sentences on Counts Two and Four to be served on and after the sentences on Counts One, Three and Five, and concurrently with each other. A fine of $5,000 on each count, totaling $25,000, was imposed, and a special parole term of three years. (R. 30)

The court below held that petitioner could be sentenced upon only one of the three conspiracy counts (One, Three and Five), and remanded the case for sentencing "upon any one of the three conspiracy counts the United States may select, and for dismissal of the other two conspiracy counts." Otherwise, the court below affirmed the judgment of the District Court.

Reasons for Granting the Writ

I. Petitioner's Motion for Judgment of Acquittal Should Have Been Allowed Where the Government Could Neither Prove That Cannabis Is Monotypic Nor That the Substance Involved Here Was Cannabis Sativa L.

Counts One through Four[1] charged petitioner with violations concerning "marihuana" under 21 U.S.C. §§ 841 (a)(1), 846, 952(a) and 963. Those statutes refer back to section 812, schedule I(c)(10). Marihuana is defined as used in the above sections by section 802(15) as "all parts of the plant Cannabis sativa L. . . . ." This definition was most recently established by 84 Stat. 1242, Pub. L. 91-5B, Title II, § 102, although it has a lengthy history.

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[1] Count Five, insofar as it alleges a conspiracy to import marihuana "contrary to law", must be treated similarly.

The circumstances which led to the arrest and conviction of petitioner did not include the recovery of any of the material which he was charged with having imported, possessed, and distributed. There was no proof on the part of the prosecution at trial as to the botanical nature of the substance which was the subject of the charges brought against petitioner.

The court below upheld the government's position that as used in the statute, "Cannabis sativa L." includes *all* species of Cannabis, including Cannabis indica and Cannabis ruderalis. Supporting the government's position on this issue, in addition to the court below, are the decisions in *United States* v. *Gaines*, 489 F.2d 690 (5th Cir. 1974); *United States* v. *Rothberg*, 480 F.2d 534 (2d Cir. 1973), *cert. denied*, 414 U.S. 857; *United States* v. *Moore*, 446 F.2d 448 (3d Cir. 1971), *cert. denied*, 406 U.S. 909 (1972).

Supporting petitioner's position are *United States* v. *Lewallen*, No. 72-Cr-94 (W.D. Wisc., Dec. 17, 1974); *United States* v. *Collier*, 14 Crim. L. Rep. 2501 (D.C. Sup. Ct., March 19, 1974); and *United States* v. *One 1966 Chevrolet Sedan Automobile*, No. 73-1340-Civ. CA (S.D. Fla., Jan. 16, 1974, amended Feb. 16. 1974.)[2]

Petitioner sought to introduce in evidence the expert testimony of Dr. Richard Schultes that the genus Cannabis is polytypal. A *voir dire* was allowed, in which Dr. Schultes stated that in his opinion Cannabis by its "internal and external structure . . . [shows] three different species", namely, Cannabis sativa, Cannabis indica, and Cannabis ruderalis, and that opinion as to the polytypal nature of

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[2] At least one state court, Vermont, where the state statute prohibits both Cannabis sativa L. and Cannabis indica, found a defendant in a marihuana case not guilty because the state could not prove the substance in his possession was not Cannabis ruderalis. *State of Vermont* v. *Richard Sherman*, No. 427-73-Cacr. (Caldonia County District Court, Aug. 8, 1974)

Cannabis dates back to the eighteenth century. (Tr. 3-12 through 13) Dr. Schultes further testified that there are two species of Cannabis presently growing in Jamaica, namely, Cannabis sativa and Cannabis indica. (Tr. 3-25)

The court excluded the testimony of Dr. Schultes on the ground that it was legally immaterial under the statute, holding that the statute prohibited all of the species of Cannabis.[3] (Memorandum And Order, March 5, 1974, R. 24) The Court of Appeals affirmed.

The issue in this case is whether or not the controlled substance "marihuana" includes all species of the genus Cannabis where the language of the statute specifically proscribes only Cannabis sativa L.; and whether or not in view of this language of the statute, the government must prove beyond a reasonable doubt either that Cannabis is in fact monotypic or, if polytypic, that the petitioner's substance was Cannabis sativa L., as opposed to any other species of the Cannabis genus.

The definition of marihuana as Cannabis sativa L. was initially established by the legislature in the Marihuana Tax Act, 26 U.S.C. 4761, enacted in 1937, and that definition has not been altered in subsequent revisions of the law. At the time of the enactment of the Marihuana Tax Act, expert opinion was not agreed that there was only one species of marihuana, and laymen were thrown into confusion by the welter of terminology. At the House Committee on Ways and Means, the confusion of lay and expert opinion alike was not resolved. Thus, while Commissioner Anslinger of the Bureau of Narcotics could submit that "all cultivated or wild hemp is now recognized as belonging to one species—Cannabis sativa", Hearings on H.R. 6385 Before the House Committee on Ways and Means, 75th Cong., 1st Sess. 38 (1937), Lyster H. Dewey,

[3] The court also denied defendant's motions for acquittal and requests for jury instructions based on this issue.

formerly in charge of fibers at the Department of Agriculture, first having stated that "there is only one species known as hemp", said:

> There is no connection at all between them [e.g., the hemp plant that produces fiber for rope and the plant that produced soft fiber that produces marihuana]. *Id.* at 55-56.

Reymond G. Scarlett, a representative of the seed trade, testified before the Committee:

> When this bill came out and we saw that it was called a bill to impose an occupational excise tax upon dealers in marihuana we paid no attention to it. Nobody in the seed trade refers to hemp seed as marihuana.

The discussion continued:

> Mr. Reed: Several people have talked to me about marihuana and they have impressed me with the fact, that they are different plants. I think that ought to be cleared up in the public mind, so that we may know we are dealing with hemp. It appears that it is grown in backyards, but I suppose that a good many people have the idea that it is some sort of a new species of plant in this country.
>
> . . .
>
> . . . it is hemp growing wild, is it not?
>
> Mr. Disney: I do not know.
>
> Mr. Reed: There seems to be quite a good deal of confusion about it . . . we might as well clear up that situation and say that we are not dealing with the ordinary hemp plant, wild or cultivated, if that is right.
>
> Mr. Hester: That is right. *Id.* at 76.

Dr. William C. Woodward, Legislative Counsel for the American Medical Association, stated that "the American Medical Association would enter no objection at all to the inclusion of *Cannabis indica, or the various types of Cannabis,* in the Harrison Narcotic Act." *Id.* at 96 (emphasis added.)

The significance of this issue was directly addressed by the Hon. Ralph F. Lozier who addressed the Committee on behalf of the National Institute of Oilseed Products:

> ... it has been admitted here, and the books show it, that this plant exists all over this Nation, and the question is how far this bill shall go. If it be true that cannabis sativa is one species and that there are other species, or plants of a different genus or family, containing this deleterious principle, then, by the limitation in section 1, you have made it impossible to regulate or supervise the deleterious products that come from those other species. I am not very familiar with botany, but there is the family, the genus, and the species. This bill is directed only to one species, and the botanists or authorities are not agreed as to whether the cannabis sativa Americana is the same species as the cannabis sativa L.—the L referring to Linne, the Swedish botanist who identified and described this plant and its products. *Id.* at 64.

The plethora of views as to what substance was being controlled and what ought to be controlled was not limited to the Congress. The state legislatures were in a similar state of confusion. Prior to the adoption of the Uniform Narcotic Drug Act by the National Commissioners on Uniform State Laws in 1932, thirty-two states had enacted some form of legislation prohibiting the distribution of marihuana for non-medical purposes.

Only two legislatures had proscribed only Cannabis sativa L.—California and Utah.[4] On the other hand, eight had proscribed only Cannabis indica.[5] Twelve states proscribed Cannabis indica and/or Cannabis sativa,[6] and the rest variously outlawed "Cannabis Americana",[7] "Cannabis Americana or Cannabis indica",[8] "Cannabis indica, Americana, and sativa",[9] or "Cannabis sativa, also known as Cannabis indica".[10] Nebraska simply outlawed "Cannabis"[11]; North Dakota and Pennsylvania outlawed "marihuana".[12] Whatever else can be said of this diversity of legislative wills, it cannot be said that there was universal agreement about the definition of marihuana, nor can it be said that the Congress was unaware that there existed different species of the genus Cannabis.

Moreover, there is evidence in the legislative history of the Marihuana Tax Act that Congress *intentionally* pro-

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[4] California Acts 1066, Ch. 604, 1915; Utah Laws 77, Ch. 66, 1915.

[5] Arkansas Acts 177, Act 213, 1923. Massachusetts General Acts, Ch. 276, §19, 1917. Mississippi Laws 13, Ch. 13, 1930. Montana Laws 324, Ch. 91, §3186, 1927. Nevada Stat. 39, Ch. 33, 1923. New Mexico Laws 58, Ch. 42, 1923. Oregon Laws 35, Ch. 27, 1923. Rhode Island 145, Ch. 1674, 1918.

[6] Arizona Laws 61, Ch. 36, 1931. Illinois Laws 1027, Ch. 38, House Bill No. 557 §2(13), 1931. Indiana Acts 616, Ch. 189, 1929. Kansas Laws 247, Ch. 192, Acts of 1927. Maine, 6th Revised Statutes, Ch. 20 §22, 1917. Michigan Laws 841, No. 310, Art. 1(14), 1929. New York Laws 1675, Ch. 672 §421(14), 1927. Ohio Laws 187, House Bill No. 422 at page 187, 1927. Oklahoma Session Laws 53, Ch. 24, 1933. South Dakota Laws 100, Ch. 127, 1931. Texas General Laws 156, Ch. 61, 1919. Vermont Acts and Resolves 336, Sec. 197, 1915.

[7] Wyoming Sess. Laws 67, Ch. 57, 1929.

[8] Alabama Acts 42, No. 26, 1931. Code of Iowa, Ch. 156 §3151, 1927. Annotated Supplement, Louisiana Statutes of 1915, Act 41 of 1924, at p. 389.

[9] Delaware Acts 658, Ch. 191 §160, 1933.

[10] Colorado Laws 120, Ch. 39, 1917. Idaho Laws 136, Ch. 105, 1927.

[11] Nebraska Laws 393, Ch. 145, 1927.

[12] North Dakota Laws 158, Ch. 106, 1933. Pennsylvania Laws 904, No. 163, 1933.

scribed only the domestic variety of the Cannabis plant. In 1937 there were two marihuana control bills before the legislature, the one H.R. 229, "a bill prohibiting the importation of cannabis indica, cannabis sativa, or cannabis Americana for the purpose of making the narcotic drug known as marihuana, or for any other purpose", 81 Cong. Rec. 29 (1937); and the other, H.R. 3873, " a bill to prohibit the sale, possession, and transportation of Cannabis and its derivatives and compounds," *Id.* at 541.

When H.R. 6906 was presented to the House, its sponsor, Representative Buck of California, made it clear that it was the domestically grown Cannabis—Cannabis sativa L. —that was being described. The bill did not deal with foreign-grown species:

> ... We cannot regulate its use by bringing it under the Harrison Narcotics Act, because the Harrison Narcotics Act applies to drugs which are not grown in this country, while this plant, Cannabis sativa L., is grown practically throughout the United States ... 81 Cong. Rec. 5689 (1937).

Representative Reed also made it clear that it was the domestically grown marihuana that was being attacked in the Bill.

> It is a plant that grows in practically all parts of the United States. Within the last few years its cultivation for illicit purposes has increased rapidly and over a large area of the country. It is grown in the back yards of city lots and sold to peddlers, who make it into cigarettes, which they then retail to school children and to their adult victims. 81 Cong. Rec. 5689-5690 (1937).

As the Court noted in *United States* v. *Collier,* 14 Crim. L. Rept. 2501 (D.C. Sup. Ct. 1974), slip opinion p. 10,

the issue is not "whether this choice of statutory language was provident; rather the issue is simply whether . . . Congress knew . . . that there was a dispute in the scientific community on the issue of whether Cannabis was polytypic." From the foregoing it appears that Congress did know that Cannabis was polytypic and chose to regulate one, and only one, of its species.

However, the Courts of Appeals have interpreted 26 U.S.C. § 4761(2) expansively. In *United States* v. *Rothberg, supra,* 480 F.2d at 535, the court stated that statutes must be construed with a view to "the conditions under which the Congress did act", and a similar view is espoused in *United States* v. *Moore, supra.* Operating within this frame, both the *Rothberg* and *Moore* courts held that whereas 26 U.S.C. §4761(2) defines marihuana as "all parts of the plant Cannabis sativa L.," the legislative history of the federal marihuana statutes clearly indicates congressional intent to make the statutory definition of Cannabis all-inclusive. *United States* v. *Moore, supra,* 446 F.2d at 450; *United States* v. *Rothberg, supra,* 480 F.2d at 536.

However, more recently the District of Columbia Superior Court in *United States* v. *Collier,* 14 Crim. L. Rep. 2501, *supra,* the District Court for the Western District of Wisconsin, in *United States* v. *Lewallen,* No. 72-Cr-94 (W.D. Wisc., Dec. 17, 1974), and the District Court for the Southern District of Florida, in *United States* v. *One 1966 Chevrolet Sedan Automobile,* No. 73-1340-Civ. CA (S.D. Fla. January 16, 1974, as amended Feb. 16, 1974) have presented thorough opinions refuting the basis of the *Moore* and *Rothberg* holdings. The *Collier court,* while it did not dispute the principle that judicial interpretation should not be overly narrow, undertook an extensive review both of legislative history leading to the enactment of the marihuana tax act statutes of 1937 and the Uniform Nar-

cotics Act of 1938 and of contemporary botanical opinion concerning marihuana and concluded that the legislators were fully aware of the existence of Cannabis indica as well as Cannabis sativa L.

To support its position the court quoted from various of the six drafts of the Uniform Narcotics Act of 1938:

> The first draft of the Act was prepared in 1925 and five tentative drafts (including two third drafts) were subsequently written before the Act was finally adopted by the Commissioners in 1932. Given the extensive mention of Cannabis species other than *sativa* in the botanical and legal literature, it was quite unlikely that the drafters of the Act would fail to be aware of the multiple species nomenclature, and indeed each of the six drafts, excepting the first third draft and the final draft, made explicit references to species of Cannabis other than sativa L. The first draft defines "habit-forming drugs" as "cocoa leaves, opium, cannabis indica or cannabis sativa." The second third draft and the fourth draft include a third species of Cannabis:
>
> > "*Section 12:* (*Cannabis indica, Cannabis Americana* and *Cannabis sativa*) No person shall plant, cultivate, produce, manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound cannabis indica, cannabis americana, or cannabis sativa, or any preparation or derivative thereof...."
>
> It is thus beyond question that the framers of the Uniform Narcotics Act were aware of the existence of multiple species of Cannabis or at the very least were aware that a substantial number of scientists accepted the existence of multiple Cannabis species. The inclusion of the single term "Cannabis sativa L."

> in the final draft of the Uniform Narcotics Act was a conscious choice made with full cognizance that botanical literature reflected the possible existence of more than one species.
>
> *The question here is not whether this choice of statutory language was provident; rather, the issue is simply whether the Uniform Commissioners knew when they approved the final draft of the Act in 1932, and whether the Congress knew when it enacted the Act in 1938, that there was a dispute in the scientific community on the issue of whether Cannabis was ploytypic.* It is apparent from the foregoing that both the Commissioners and the Congress were indeed well aware of that dispute. (Footnotes and citations omitted.) (Emphasis added.) *United States* v. *Collier, supra,* slip opinion, pp. 9, 10.

The *Collier* court also cited Dr. Richard Schultes, the acknowledged expert in this field who testified not only that Cannabis is polymorphic in nature, but that scientists have long used a wide variety of names to indicate the various species of the genus. *United States* v. *Collier, supra,* slip opinion, pp. 6-7. "[T]his plethora of terms ... seeped into the general botanical literature and then into non-botanical sources. The result was a general confusion of technical and popular terminology,... Likewise, this confusion affected legislation which was sought to control the use of marihuana." *idem.* In view of this evidence of confusion among botanists and legislators, the court in *Collier* characterized the *Rothberg* court as having been "rather sanguine" as to its conclusions about the consensus in 1937 of expert scientific opinion about the properties and nature of marihuana, and "wildly optimistic when it determined that 'Cannabis sativa L.' was 'a phrase whose meaning was clearly understood by Congress at the

time of the enactment [of the Marihuana Tax Act in 1937].' " *United States* v. *Collier, id.*, slip opinion, p. 8.

The court in *United States* v. *Lewallen, supra,* stated similarly:

> I cannot escape the conclusion that Congress has failed to include within a penal statute possession, with intent to distribute, of Cannabis other than Cannabis sativa L. 21 U.S.C. §§ 841(a)(1), 812(c) (Schedule I, (c)(10), 802(15)). I do not think it would be sufficient, even if the Congressional history were clear (and it seems far from clear) that Congress thought that Cannabis sativa L. included every form of Cannabis in which tetrahydrocannabinol is present. *United States* v. *Lewallen, supra,* at 4.

The crux of the argument is that where Congress was aware of legislative alternatives, but let lie intentional ambiguity, the courts must accept the *prima facie* significance of the language of the statute. As the *Collier* court pointed out:

> [I]t was easily within the power of Congress to draft a statute sufficiently broad to include all species of Cannabis. No great imagination would have been required to accomplish this legislative objective. Indeed, the United States is a signatory of the Single Convention on Narcotic Drugs, 18 U.S.T. 1407 (1967), which provides that "Cannabis plant" means any plant of the genus cannabis [cite omitted] . . . and thus eliminates the ambiguity [which otherwise plagues the statute].[13] *United States* v. *Collier, supra,* slip opinion, pp. 8-9.

[13] It is noteworthy that 21 U.S.C. §209, 38 Stat. 820 (1915), proscribes the sale of "Cannabis indica" except under specific circumstances, in consular districts in China by United States citizens.

The *Collier* and *Lewallen* courts espouse the principle that "in drafting penal legislation, [t]he burden lies on lawmakers, and inasmuch as it is within their power, it is their duty to relieve the situation of all doubts, *Snitkin* v. *United States*, 265 F.2d [sic] 489, 494 (7 Cir. 1920)." *United States* v. *Collier*, slip opinion, p. 4. *See also, McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) cited in *United States* v. *Collier, supra*, slip opinion, p. 11.

A corollary principle is that criminal statutes must be strictly construed.[14] As is stated in *United States* v. *Lewallen, supra:*

> [T]he decisive point, it seems to me, is that those whose very function is to weigh the significance of distinctions between plants within a genus—the plant taxonomists—consider the distinctions among Cannabis sativa L. and Cannabis indica Lam. sufficient to categorize them as different species. It does not seem to me decisive whether those engaged in botanical taxonomy had addressed and investigated this question deliberately and consciously, and had arrived at some scholarly consensus, prior to 1938 or prior to 1970, when Congress acted, or whether this came later. Rather, the critical factor is whether in fact the distinctions between Cannabis sativa L. and Cannabis indica Lam. (and perhaps Cannabis ruderalis Jan.) are so insignificant that they are not to be treated as distinct species within the genus Cannabis. On the basis of this record, the distinctions are not in fact so insignificant. That penal statutes are to be strictly construed requires no citation of authority....

[14] The point is made that " 'cannabis sativa L.' is a botanical term of art, and technical words must be construed according to their technical sense, unless it is apparent that a different meaning was intended by the legislature. *N.L.R.B.* v. *Coca-Cola Bottling Co.*, 250 U.S. 264, 269 (1956)". *United States* v. *Collier, supra*, slip opinion, p. 4.

> The government contends that the conduct of this particular defendant was so furtive as to reveal that he believed he was breaking the law. I agree and I have so found the fact. The government contends, further, that this means that the application of the statute to his possession of Exhibit 3 is fair. But this is not the case of a vague statute which can fairly be applied to core conduct but cannot fairly be applied to conduct falling near its indistinct periphery. This statute is not vague; it applies to Cannabis sativa L. and to nothing else. It seems to me irrelevant that the defendant obviously believed that his possession of government exhibit 3, with intent to distribute it, was a violation of some local, state, or federal law.
>
> The government has failed to prove by any measure of proof, and surely not beyond a reasonable doubt, that government's exhibit 3 is Cannabis sativa L., as distinct from other species of Cannabis. *United States* v. *Lewallen, supra,* at 4, 5.

See also, United States v. *Wilberger,* 5 Wheat. 76, 95-96 (1820); *Laimi* v. *United States,* 155 U.S. App. D.C. 66, 476 F.2d 511, 523-525 (1973), and cases collected therein, and *United States* v. *Boston and Maine Railroad,* 380 U.S. 157, 160, 85 S. Ct. 868 (1965); *Yates* v. *United States,* 354 U.S. 298, 310, 77 S. Ct. 1064 (1957).

Despite the precedent for judicial constraint there is, as indicated in *Collier,* a strong "temptation [for the courts] to side-step the rule that criminal statutes are to be strictly construed," *United States* v. *Collier, supra,* slip opinion, p. 11. Side-stepping the rule in these circumstances, however, is firmly eschewed:

> When problems of this sort are confronted by the courts, the proper and constitutional course is to resist

> engrafting additional prohibitions onto the statute, adopt an appropriate strict construction, and, thereafter leave it to the legislature to mend its own product in whatever manner it choses. *Idem.*

The position here asserted is not new, but rather has long been the policy of our courts, as can be seen in the teaching of this Court in *United States* v. *Weitzel,* 246 U.S. 533, 543 (1917):

> [It has been shown] both how easily a *casus omissus* may arise and how long a time may elapse before the defect is discovered or is remedied. Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive.

Accord, *United States* v. *Boston and Maine Railroad,* 380 U.S. 157, 160, 85 S. Ct. 868 (1965).

Consistent with this stance against judicial usurpation of the legislative function, this Court should accede only to a strict and technical construction of the marihuana statute. In this view, possession of any plant or a part thereof of a species of Cannabis other than *sativa L.* is not unlawful. It was therefore incumbent upon the Government to prove possession of *Cannabis sativa L.* Since there was no such proof, the petitioner's motions for judgment of acquittal should have been granted.

II. It Was a Denial of Due Process of Law and of the Right of Confrontation to Limit Cross-Examination Severely and Improperly, Which Denial Cannot Be Considered Harmless Error.

There were three major prosecution witnesses, all accomplices, who testified against the petitioner. On cross-examination, the trial court rigidly followed the so-called

"federal" rule, that cross-examination was proper only if it concerned matter touched upon in direct examination. There resulted a hostile atmosphere for the cultivation of a fruitful cross-examination. Two particular instances were so severe as to constitute the denial of due process of law and of the right to confront adverse witnesses. *Davis* v. *Alaska,* 93 S. Ct. 1105 (1974); *Smith* v. *State of Illinois,* 390 U.S. 129, 88 S. Ct. 748 (1968); *Alford* v. *United States,* 282 U.S. 687, 51 S. Ct. 218 (1931).

A. During cross-examination of Helliesen, one of the three witness-accomplices, counsel sought to substantiate petitioner's claim that he was approached before trial by one Martha Snyder on Helliesen's behalf, with an offer that Helliesen would keep silent for $10,000.00. (Tr. 2-34 to 36, 127 to 132)

The trial court ruled out that line of questioning on the ground that the "scope of the cross-examination is set by the scope of the direct examination," and that "your alleged purpose [impeachment] does not set the rules of the ballgame." (Tr. 2-35 to 36) The Court of Appeals ruled that the trial court was in error (Opinion, p. 8), but that the error was harmless for the following reasons:

1. Upon previous government investigation, Helliesen had flatly denied having made such a solicitation, and there was no reason to suggest that Helliesen would now admit it;

2. Martha Snyder refused to answer any questions about the alleged solicitation and in fact was excused from testifying after petitioner subpoenaed her, when her attorney informed the court that she would claim her privilege against self-incrimination.

3. There was strong corroborating evidence of Helliesen's testimony than an otherwise searching cross-examination allowed.

The first two of these reasons are insufficient, since they assume that Helliesen, under oath, and under different pressures, and face-to-face with petitioner, would give the same answer he gave to government agents when questioned in jail. The right to confront witnesses means nothing if it does not mean the right to challenge a witness' prior statements by cross-examination under oath. In *Smith* v. *Illinois, supra,* and in *Alford* v. *United States, supra,* this Court upheld the right on cross-examination to ask the witness his true name and addreess.

In neither of those cases was there a requirement that defendant make an offer of proof that the questions would elicit impeaching testimony.

> "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." *Alford* v. *United States, supra,* 282 U.S. at 692, 51 S. Ct. at 219.

Here, defense counsel did in fact base his questions on information given to him by the defendant and previously reported to the government. The Court of Appeals assumed that the witness would give the same answer, in open court, under oath, that the witness previously gave while in jail under questioning by F.B.I. agents. Such an assumption was totally unwarranted in the first place, and, more importantly, it ignored the right of petititoner to require the witness to give his answer confronting the petitioner and under oath.

Of course, petitioner could not force Martha Snyder to testify concerning the attempted bribe. But she was not a witness against him. If her refusal to testify on this issue

on the ground that it might tend to incriminate her has any relevance, it is only to support the petitioner's position. The same may be said for her refusal to talk to government officials about the matter.

Whether the evidence corroborating Helliesen's testimony was so strong as to make this "harmless error" is highly speculative. There was little evidence against petitioner except for that of the accomplice-witnesses, all of whom were granted substantial inducements for their testimony. At best, accomplice testimony is unreliable. This has been recognized from the earliest times of our judicial history:

> ". . . the source of this evidence [accomplice testimony] is so corrupt, that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation." *Commonwealth* v. *Bosworth*, 22 Pick. (39 Mass.) 397, 399 (1839).

Clearly, had Helliesen admitted this bribe attempt, it could have had a substantial impact on his credibility, and, perhaps, on that of his accomplices as well.

B. The second serious denial of the right to impeach the testimony of an accomplice-witness occurred when counsel cross-examined the accomplice Thurlow. After bringing out that Thurlow had been a substantial user of many types of drugs, counsel asked him, "And you told me that you had a nervous breakdown, didn't you?" (Tr. 1-122) The court sustained the government's objection. Counsel then asked, "Were you in the Jackson Memorial Hospital in Miami, Florida?" (Tr. 1-122) The court again sustained the government's objection, stating:

> The Court: "I don't think you can impeach him unless you have the hospital record here.
>
> * * *

> ". . . you don't impeach him without a hospital record. That is the normal way to impeach him."
> Mr. Troy: "The Jencks material in no way indicated any of this information, and he wasn't available for our interview until yesterday, and I just didn't have it. This is what he told me."
> The Court: "I am ordering you that you are not going into that line." (Tr. 1-123)

The court below affirmed the trial court, holding:

> The court acted within its discretion. By revealing the dates and condition for which treatment was provided, a hospital record would at least have provided a basis for gauging the materiality of the inquiry. While insanity or abnormality at the time of observing the facts testified to or at the time of testimony are provable, a 'nervous breakdown' at some unspecified time is too remote . . . . No offer of proof was made that Thurlow's condition would be shown to relate to his competency or qualifications as a witness. The court was entitled to weigh the potential unfairness of a free wheeling inquiry intended to stigmatize the witness against whatever materiality the evidence might have. (Opinion, p. 11)

That view totally ignores the mandate of *Alford* v. *United States, supra, Smith* v. *State of Illinois, supra,* and *Davis* v. *Alaska, supra.* As was said in *Alford*:

> no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to

> protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him . . . . But no such case is presented here . . . . 282 U.S. at 694, 51 S. Ct. at 220.

This view was emphasized in *Davis* v. *Alaska, supra.*

The questions here were entirely proper, and in no sense designed solely to harass, annoy or humiliate the witness. The Court of Appeals correctly assumed that testimony about the nervous breakdown would have been relevant if the breakdown had occurred within the proper time frame.[15] If there is such a limitation as to when a nervous breakdown is material, the petitioner should have been given the opportunity to supply the requisite information through a *voir dire* examination of the witness. The trial court, however, did not make its decision on that basis, but simply ruled that only extrinsic evidence could be used to prove the breakdown, knowing that it was impossible for petitioner to provide, or to have provided, the required documentation. Certainly, no continuance would have been granted to obtain the records. Counsel for petitioner was not apprised that any issue of materiality had been raised.[16]

The Court of Appeals has totally overlooked the practicalities of the situation. Petitioner's counsel had not been told of the witness' psychiatric history in advance, and the witness had only become available for interview the day before trial. Since the burden was not on petitioner

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[15] In *Ramseyer* v. *General Motors Corporation*, 417 F.2d 859, 863 (8th Cir. 1969), the court held that the trial court had not erred in permitting the jury to consider testimony, elicited on cross-examination, that the witness had been treated at a mental hospital for nervous breakdown about eight years before the incident in question at that trial.

[16] Had the government raised the issue of materiality in the trial court, counsel would have been able to deal with it. But it was raised for the first time on appeal.

to show that his questions on cross-examination would prove fruitful, see *Alford* v. *United States, supra,* and *Smith* v. *State of Illinois, supra,* the Court of Appeals erred in belatedly assigning this burden to him. And even if the Court of Appeals was correct in putting the burden on petitioner, he should have been allowed to meet that burden at trial through examination on *voir dire.*

Had petitioner been able to examine as to this issue, and to examine the witness Helliesen concerning the bribe attempt, he might have been able to make serious inroads on the credibility of two of the three major witnesses against him. The denial of that right to confront his accusers cannot be considered harmless error.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 74-1112

UNITED STATES OF AMERICA,

APPELLEE,

v.

GEOFFREY HONNEUS,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Daniel Klubock, with whom *Kirk Y. Griffin* and *Featherston, Homans, Klubock & Griffin* were on brief, for appellant.
Lawrence P. Cohen, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellee.

December 24, 1974

CAMPBELL, *Circuit Judge*. After a jury trial Geoffrey Honneus was convicted in the district court upon charges arising from his participation in a scheme to buy marihuana in bulk in Jamaica and transport it back to New England in an auxiliary yacht chartered for the purpose. His contentions on appeal, and the facts material to them, are discussed below.

I

Honneus contends that it was improper to convict and sentence him under three conspiracy counts all stemming from the same conspiracy. In the six count indictment

Honneus and others were charged with three substantive offenses and three counts of conspiring to accomplish the substantive offenses. The substantive counts were for importing marihuana in violation of 21 U.S.C. § 952(a); distributing and possessing marihuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1); and smuggling marihuana in violation of 18 U.S.C. § 545. The count charging a conspiracy to import and that charging a conspiracy to distribute and possess were brought under separate drug conspiracy statutes, respectively 21 U.S.C. § 963 and 21 U.S.C. § 846. The count charging a conspiracy to smuggle was brought under the general federal conspiracy statute, 18 U.S.C. § 371.

Identical overt acts were listed in the indictment under each conspiracy count; and Honneus argues that since the evidence disclosed but a single agreement, the fact that the objects of the agreement amounted to three distinct crimes did not transform one conspiracy into three. In *Braverman* v. *United States*, 317 U.S. 49, 53 (1949), the Supreme Court said:

> "Whether the object of a single agreement is to commit one or more crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."

In *Braverman* the defendant had been sentenced upon each of several conspiracy counts brought under § 37 of the then Criminal Code charging a conspiracy to violate different provisions of the Internal Revenue laws. The Supreme Court held that only a single sentence could be imposed and remanded for resentencing.

In *Braverman*, where all counts violated but a single conspiracy statute, it could without difficulty be said that

the single conspiracy differed "from a single act which violates two statutes." *Id.* at 54. In the present case, each conspiracy count was brought under a different federal conspiracy statute. In addition, the statutory penalties vary slightly as between statutes, and there appears to be some difference as to standards of proof respecting overt acts. The Government contends that these factors turn the one criminal agreement into a trilogy of crimes.

We disagree. While undoubtedly Congress meant to attack the drug trade with severity, *see Gore* v. *United States*, 357 U.S. 387 (1957), we doubt that it meant to authorize, or could authorize, a court to impose three punishments for one conspiracy. Congress may treat different aspects of the same conduct as separate crimes only if there is a meaningful distinction between the elements constituting each offense. *See id.; American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *Blockenburger* v. *United States*, 284 U.S. 299, 304 (1931). Here, unlike in *American Tobacco*, the agreement was identical in all three alleged conspiracies; the Government concedes as much. In *Braverman* the Court held that all separate criminal objects are "embraced" within the single continuing agreement. "The conspiracy is the crime, and that is one, however diverse its objects." *Id.* at 54, quoting from *Frohwerk* v. *United States*, 249 U.S. 204, 210 (1918) (Holmes, J.). We hold that charging a single illicit agreement under several statutes does not make it more than one conspiracy. *United States* v. *Noah*, 475 F.2d 688 (9th Cir. 1973); *United States* v. *Mori*, 444 F.2d 240 (5th Cir. 1971).

We do not question Congress' power to enact the three statutes nor the Government's power to charge under them; but we find only one crime, for which only a single sentence could be imposed. We therefore disagree with Honneus that he is entitled to a new trial. *Cf., Braverman, supra*

at 55; *Mori, supra* at 246. An election was required in connection with sentencing, but not before. For practical reasons, we think the Government was entitled to request separate verdicts under all three statutes. The conspiracy with its several objects could, it is true, have been charged in a single count, *Braverman, supra* at 54. But had this been done, the court would not have known whether Honneus was found by the jury to have conspired to achieve all or only some of the illegal objects, and thus would not have known which of the statutory sentences were available. Other problems could perhaps have arisen had the court provided for special verdicts or asked special questions. *See United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969). Alternatively, if the Government had been forced to elect before trial, it would have had to gamble on proving one illegal object when there were, in fact, several, any one of which would have supported a finding of the agreement's illegality.

We thus find no error, nor do we believe there was prejudice, in submitting all three counts to the jury. But since there was but one crime, only one sentence could be imposed. We accordingly vacate the separate concurrent sentences under Counts 1, 3 and 5 and remand for sentencing upon any of the three counts the United States may select. Surplus counts are to be dismissed.[1]

II

Respecting Count 4,[2] which charged the distribution and possession of marihuana with intent to distribute, Honneus

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[1] In future cases of this nature, a district court may after verdict enter concurrent sentences on the multiple counts with the proviso that all except one of the counts and sentences shall be dismissed upon appellate affirmance of the specified count and sentence.

We do not endorse charging the same conspiracy in several counts unless there are different conspiracy statutes with different statutory sentences.

[2] We by-pass as without merit the contention that Count 3, as worded, failed to state an offense.

makes several arguments about venue and jurisdiction. First he says that the indictment was defective for failure to allege where the offense took place. But it is well established that an indictment is not legally insufficient for failure to include such an allegation. *See, e.g., United States* v. *Branan,* 457 F.2d 1062 (6th Cir. 1972); *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964) Honneus would have been entitled to the information had he sought a bill of particulars. He did not do so. Our attention is directed to a co-defendant's motion for particulars which was allowed and to which, Honneus now argues, the Government responded inadequately. This is of no assistance to Honneus. His sole connection with the motion is a paper filed later by his attorney* purporting to join in "each and any and all of the co-defendant's motions, requests and petitions." Apart from the fact that it was "denied" by the court, the shotgun joinder obviously did not alert the court that Honneus was seeking information as to the place of possession, or that he was dissatisfied with information in the Government's bill of particulars filed a response to a co-defendant's motion.

Also in conjunction with Count 4, Honneus argues that he was entitled to an instruction on "venue". There was evidence that Honneus, who lived in Massachusetts, flew to Jamaica and, with others, purchased the marihuana there and arranged to have it loaded on a vessel which had been sailed from Duxbury, Massachusetts, to Jamaica expressly to make the pickup. After the vessel was loaded, it sailed back to Massachusetts, where its owner contacted Honneus and arranged to have the marihuana off-loaded in Maine coastal waters. Finally there was evidence from which the jury could have found that Honneus had in his possession and sold some of the marihuana in Massachusetts prior to

* Honneus' counsel on appeal did not represent him at trial.

his arrest in that state. The latter evidence of illicit possession and distribution within Massachusetts was ample to support both the jury's verdict under Count 4 and venue within the District of Massachusetts. F. R. Crim. P. 18; *see* 18 U.S.C. § 3237.

But Honneus argues that since the jury may have rested its conviction only upon the evidence of possession within Jamaica, the court erred in not instructing that possession had to be found in Massachusetts. The premise of this argument is doubtful. One might question whether a jury which found Honneus guilty on all counts, including ones for smuggling and conspiracy, was likely to have rejected the evidence of possession and distribution within Massachusetts. It is also quite possible, although we do not decide the question, that possession in Jamaica by a U.S. resident intending to distribute within the United States and later doing so, is within the reach of United States criminal jurisdiction and was prosecutable in the district of Massachusetts where Honneus was arrested.[3] 18 U.S.C. § 3238.

But even if it is assumed that Honneus would have been entitled upon appropriate request to an instruction requiring a finding of possession within the geographical confines of Massachusetts, we are not convinced that it was plain error for the court not to have given one. A failure to instruct on venue is not normally plain error. *See United States* v. *Guy*, 456 F.2d 1157, 1163 (8th Cir. 1972); *Bellard* v. *United States*, 356 F.2d 437 (5th Cir. 1966). Honneus was tried in the district both where he was living and where the criminal plans were laid and took effect. *Cf. Travis* v.

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[3] *See Kawakita* v. *United States*, 343 U.S. 717 (1952); *United States* v. *Flores*, 289 U.S. 137 (1933); *Ford* v. *United States*, 273 U.S. 593 (1927); *cf. Travis* v. *United States*, 364 U.S. 631 (1960); Hall, et al., Modern Criminal Procedure 867 n. 3; *Rivard* v. *United States*, 375 F.2d 882, 885-88 (1967); Empsom, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 Am. Crim. L. W. 32 (1967); 18 U.S.C. § 7.

United States, 364 U.S. 631 (1960). We see in this instance no reason that would exempt him from the usual salutary requirement that one complaining about an omitted instruction must have tendered a request and objected to its omission. *United States* v. *Lachman*, 469 F.2d 1043 (1st Cir. 1972). We note that the Government had proposed an instruction permitting conviction for possession outside the jurisdiction. The court declined to give it, and Honneus might have concluded that any instructions on the subject could only be to his detriment. Not only did he not assert lack of venue or jurisdiction as a ground for acquittal in motions made during the trial, but his only request for instruction arguably raising the matter seemed to focus on a different issue[4]—namely, whether the marihuana had to be Cannabis sativa L. *See Part IV infra.* This request might have been enough had Honneus objected after the court had instructed the jury. Instead, Honneus' counsel, although he raised other objections, indicated no dissatisfaction on the ground at issue. The case bears little resemblance to one cited by appellant, *United States* v. *Rodriguez*, 465 F.2d 5 (2d Cir. 1972), in which the counsel's failure to object to the charge was offset by his other actions and by the court's own recognition of venue as a prime issue.

We hold that no instruction was required. We find no merit in the different venue argument addressed to Count 2.

III

Appellant argues that rulings of the court excluding certain responses of witnesses were erroneous in that they reflected a mechanical application of the so-called "federal"

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[4] Honneus requested the following instruction:

"The court instructs the jury that, as to Count Four, the burden is on the government to prove beyond a reasonable doubt that defendant, Geoffrey Honneus, possessed Cannabis Sativa L., in the District of Massachusetts. If the government fails to satisfy you beyond a reasonable doubt that the defendant, Honneus, possessed that substance, then you shall find him not guilty of Count Four."

rule limiting cross-examination to matters presented during direct. *See* 6 J. Wigmore, Evidence §§ 1885-91 (3d ed. 1940). The most serious complaint of this nature stems from circumstances relating to Honneus' claim that he was approached before trial by one Martha Snyder on behalf of a government witness, William Helliesen, with an offer that Helliesen would keep silent for $10,000. Honneus' counsel reported the alleged solicitation to the Government, whose agents thereafter interrogated Helliesen. It was after these events, which were made known to the court, that, prior to his cross-examination of Helliesen, Honneus' counsel announced an intention to ask Helliesen "if he knew one Martha Snyder, in fact, his girl friend." Although counsel said the question was for impeachment purposes, the court insisted that the "scope of the cross-examination is set by the scope of the direct examination," and that "your alleged purpose does not set the rules of the ballgame." From the court's remarks, counsel could understand that he was to make no inquiry of Helliesen about the purported bribe solicitation. The district court erred. Counsel was entitled to inquire whether Helliesen knew Martha Snyder and whether Helliesen had asked her to communicate an offer on his behalf to Honneus. The "federal" rule, even in its most draconian form, does not deny to a cross-examiner reasonable latitude to inquire into relevant matters that may show a witness's bias or prejudice or otherwise impeach his credibility. *Alford* v. *United States*, 282 U.S. 687 (1931); *Smith* v. *Illinois*, 390 U.S. 129 (1967). Whether Helliesen had sought to sell his testimony was such a matter. The court had broad discretion, of course, to control the extent of examination and to decide when a particular subject was exhausted. Once Helliesen denied communicating any offer through Marta Synder, it could have curtailed further inquiry, and dampened any improper effort by counsel to ask questions framed so as to

inform the jury of the supposed bribe attempt. But it should not have shut off all inquiry.

The denial of cross-examination upon a proper subject for cross-examination is a ground for reversal "if the denial appears to have been harmful." *Wheeler* v. *United States*, 351 F.2d 946, 947 (1st Cir. 1965). In *Wheeler*, defense counsel made an offer of proof that the witness would, if permitted to answer, have given an answer favorable to the defense. Here, on the other hand, counsel never outlined the questions he proposed to ask, nor did he say that he had reason to believe that Helliesen would admit participating in the bribe solicitation. This fact alone does not discharge the Government's burden. The right having been erroneously denied, the burden was upon the Government to establish the harmlessness of the denial; Honneus need not show "that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit . . . ." *Alford, supra* at 692. On the other hand the error, serious as it was, is not to be viewed in isolation in determining whether it was harmful. Later in the trial the Assistant United States Attorney, in the presence of defense counsel, detailed the steps taken to investigate Honneus' story. He represented that Helliesen, when interrogated by federal agents, had flatly denied having made any such solicitation and had termed the story a defense ploy; he also stated that Martha Snyder had declined to discuss the matter and would claim her privilege against self incrimination. Honneus' attorney, who was free to interview Helliesen, never challenged the representation that Helliesen denied the story nor suggested any reason that Helliesen would admit to it or that there were facts with which to confront him. And later, when Martha Snyder was subpoenaed by the defense, her attorney informed the court that she would claim her privilege against self incrimination and she was excused

without testifying. Bearing in mind also that Helliesen's direct testimony was strongly corroborated by other witnesses and evidence, and that Honneus' counsel was permitted an otherwise searching cross-examination of Helliesen who, the jury learned, was in jail and had received inducements from the Government to testify, we are satisfied that the error was harmless.

Honneus' other complaints of limitations upon cross-examination are less substantial. It is true that the so-called "federal" rule, if useful as a general guide, should never be rigidly applied. A cross-examiner has a right to reasonable leeway for inquiry into facts which modify or explain away other facts developed on direct examination. But most of the disputed rulings were justified apart from a mechanistic application of the "rule". Some questions were of marginal relevancy or went into matters already explored. The court had discretion to exclude them, at least without an offer of proof or other indication where they would lead. In several instances the excluded questions were asked on recross, not cross. More strictly than with cross-examination, a court may limit recross to the subject matter of redirect and may exercise extensive discretion over its scope.

Honneus further attacks the exclusion of questions put to Richard Thurlow, a former confederate turned government witness. Counsel was allowed to bring out that Thurlow had been a user of many types of drugs, but was stopped when he inquired, "And you told me that you had a nervous breakdown, didn't you?" Also excluded was the question, "Were you in the Jackson Memorial Hospital in Miami, Florida?" The court indicated that it would not permit such impeachment without a "hospital record".

The court acted within its discretion. By revealing the dates and condition for which treatment was provided, a hospital record would at least have provided a basis for

guaging the materiality of the inquiry. While insanity or abnormality at the time of observing the facts testified to or at the time of testimony are provable, a "nervous breakdown" at some unspecified time is too remote. *Cf. Sinclair v. Turner*, 447 F.2d 1158, 1162-63 (10th Cir. 1971); 3A J. Wigmore, Evidence § 935 (3d ed. 1970). No offer of proof was made that Thurlow's condition could be shown to relate to his competency or qualifications as a witness. The court was entitled to weigh the potential unfairness of a free wheeling inquiry intended to stigmatize the witness against whatever materiality the evidence might have. While of course a hospital record is not the only proper way to establish mental impairment, *see* 3A Wigmore, *supra*, §§ 878, 879, the court could impose the requirement in this instance since it could exclude the inquiry, as made, altogether.

Appellant complains that the court's impatience created a hostile atmosphere for the cultivation of a successful cross-examination. We are not persuaded that this was so. The Government presented a strong case, and a factual defense was virtually nonexistent. In such circumstances it may be especially hard to detect the threshold beyond which legitimate cross-examination becomes an idle fishing expedition. A court must allow inquiry that is germane and probative, but it need not bend over backwards to encourage the structuring of fanciful defenses. While the court's rulings here were on the side of strictness, we cannot say (except in the one respect already mentioned) that they improperly cut off any material avenues of inquiry, nor does it appear that the court's deportment was lacking in essential fairness. We therefore find no abuse of discretion.

IV

Honneus has persistently insisted that the Government never proved him guilty of dealing in "Cannabis sativa L.". The offenses in Counts 1-4 all have to do with dealings in

"marihuana", listed as a controlled substance in § 182 schedule I(c)(10). Marihuana is defined in § 802(15) as certain parts of "the plant Cannabis sativa L.".

Honneus sought to introduce testimony by Dr. Richard Schultes[5] that the Cannabis plant is a genus having three species, sativa, indica, and ruderalis, and that both sativa and indica presently grow in Jamaica. As the Government recovered no marihuana for analysis, there was no proof that the type or types of Cannabis Honneus purchased in Jamaica and later shipped to the United States were not indica rather than sativa.

Dr. Schultes testified during a *voir dire* that the disputed nomenclature could be traced back to Linnaeus' famous eighteenth century botanical compendium which listed under the genus Cannabis only a single species, sativa. A generation later, Lamarck named a Cannabis specimen collected in India, "indica", and in the 1920's Russian botanists published in their native country a study naming a third variant "ruderalis". Nonetheless, according to Dr. Schultes, the "usually accepted view" (which he himself "echoed") until a few years ago was that there was only one species of Cannabis. Now, after more study, Dr. Schultes believes there are three. *Compare* Schultes, *Random Thoughts and Queries on the Botany of Cannabis*, in C. Joyce & S. Curry, The Botany and Chemistry of Cannabis 11-38 (1970), *with* Schultes, Klein, Plowman, & Lockwood, *Cannabis: An Example of Taxonomic Neglect*, 23 Harv. Botanical Museum Leaflets 325 (1974). *See also* R. Schultes & A. Hoffman, The Botany and Chemistry of Hallucinogens 58 (1973).

The district court, ruling in a Memorandum and Order that Congress meant to include any and all marihuana-producing Cannabis in specifying "Cannabis sativa L.",

[5] Professor of Natural Sciences and Director, Botanical Museum, Harvard University.

excluded Dr. Schultes' testimony and denied Honneus' motions for acquittal and for jury instructions. Courts in three circuits have similarly held, based upon the statutory history of the 1970 Act's predecessor, the marihuana Tax Act of 1937, 26 U.S.C. § 4761, from which the definition of marihuana was taken. *United States* v. *Rothberg,* 351 F. Supp. 1115 (E.D.N.Y. 1972), *aff'd,* 480 F.2d 534 (2d Cir. 1973), *cert. denied,* 414 U.S. 857; *United States* v. *Moore,* 330 F. Supp. 684, 686 (E.D. Pa. 1970), *aff'd,* 446 F.2d 448 (3d Cir. 1971), *cert. denied,* 406 U.S. 909; *United States* v. *Gaines,* 489 F.2d 690 (5th Cir. 1974). In testimony on the Marihuana Tax Bill before the House Committee on Ways and Means, Commissioner of Narcotics Anslinger in 1937 stated that "Cannabis indica, or marihuana, has as its parent the plant known as Cannabis sativa". The Commissioner went on to say,

> "It's popularly known in India as Cannabis indica; in America, as Cannabis Americana; in Mexico as Cannabis Mexicana, or marihuana.
>
> "It is all the same drug, and is known in different countries by different names. It is scientifically known as Cannabis sativa . . . ."

Hearings on H.R. 6385 before the Comm. on Ways & Means, 75th Cong., 1st Sess. at 37-38 (1937).

Dr. Lyster Dewey, a botanist formerly in charge of the Agriculture Department's fibre division, also testified that there was "only one species known as hemp." *Id.* at 55.[6] Honneus argues that this certainty as to only one species is misleading, that others concerned with the 1937 Act were much less clear that sativa included other types if there were any others. There is indeed evidence of confusion over

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[6] *See also* Hearings on H.R. 6906 before the Senate Comm. on Finance, 75th Cong., 1st Sess. at 23 ("botanists now recognize hemp as consisting of only one specie").

terminology,[7] but none that Congress meant to exclude from regulation any type of the plant producing the hallucinogenic material popularly known in this country as "marihuana". *See* H.R. Rep. No. 792, 75th Cong., 1st Sess. at 3-4 (1937); 81 Cong. Rec. 1440-41 (June 11, 1937) (appendix); 81 Cong. Rec. 5689-90 (June 14, 1937). Appellant's suggestion that sativa was selected because of an intention to deal only with the type most commonly grown in America is not borne out by the legislative record. Such an approach would have amounted to exemption of material from easily procurable plants having the same properties as the ones regulated. *See generally* 81 Cong. Rec. 5690 (June 14, 1937). We are persuaded that Congress adopted "Cannabis sativa L." believing it to be the term that scientists used to embrace all marihuana-producing Cannabis; the other named sorts were not seen as separate Cannabis species. Linnaeus had listed but the one species,[8] and appellant's

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[7] Dr. S. Hilton of the American Pharmaceutical Association referred to Cannabis indica throughout his testimony. Hearings on H.R. 6385 before the Comm. on Ways & Means, 75th Cong., 1st Sess. at 121-22 (1937). *See generally* 81 Cong. Rec. 5575 (June 10, 1937) (remarks by Rep. Vinson).

Early drafts of the Uniform Narcotics Act of 1938 used multiple species nomenclature, and one court has relied heavily on this fact in concluding that the drafters of the 1938 Act made a conscious choice with complete awareness that "botanical literature reflect the possible existence of more than one species." *United States* v. *Collier*, 14 Crim. L. Rept. 2501 (D.C. Sup. Ct. 1974). We do not follow the Superior Court in *Collier* because we believe the use of various names is consistent with the explanation given to Congress in 1937 that there was only one species, though many local names.

[8] C. Linnaeus, Special Plantarum, A Facsimile of the First Edition 1753, at 1027 (1959 ed.). Although Linnaeus gave India as the country of origin of Cannabis sativa, he apparently based his original description on hemp grown in northern Europe in 1737, which he knew in a living state. *See* Stern, *Typification of Cannabis Sativa L.*, 23 Harv. Botanical Museum Leaflets 325, 330 (1974). Linnaeus' use of diagnostic phrase names under Cannabis sativa may indicate that he believed other species of the genus might possibly exist and would need to be contrasted with this species, *id.*, but his use of only one species could nevertheless have persuaded botanists and lawmakers that varieties were derivative from the sole species, Cannabis sativa.

own expert concedes that until recently the monotypic view has been the "usually accepted" one. This is not to try to refute Dr. Schultes' present view. The issue is not whether marihuana is monotypic or polytypic but what Congress meant when it used the term "Cannabis sativa L.". We hold that the district court's ruling and exclusion of Dr. Schultes' testimony were correct.

A remaining question is whether the definition was adequate to forewarn Honneus of the crimes for which he was later charged. We think it was. Right or wrong, the monotypic classification has had considerable currency until very recently at least; use of "Cannabis sativa L." was, we think, sufficient to put a procurer on notice that he acted at his peril, *see Rothberg, supra,* and of course there is no evidence whatever that Honneus sought only "indica" rather than "sativa" or believed that he was acting legally. To the contrary, the venture was clandestine, and its participants clearly recognized its illegality. Had the question arose in connection with a drug less widely publicized than marihuana, the definition might take on greater importance. Here we find it too obvious for discussion that Honneus understood in advance that the importation and distribution were crimes.

V

Honneus argues that his former associates, Robert Puffer and Helliesen, should not have been permitted to give opinion testimony concerning a resemblance between the material they handled in 1972 and marihuana. Puffer testified that a sack brought from Jamaica contained darkish-green, leafy plant material that appeared similar to marihuana (which he testified to having smoked and seen growing before). Helliesen said the material was "greenish material resembling marihuana". (Helliesen further testified to having smoked marihuana on numerous occasions.) A third associate, Richard Thurlow, gave similar testimony

to which appellant does not, however, object, since it merely described the material as "a greenish-brown vegetable matter", similar to "material" he had previously smoked. The witnesses, though without scientific expertise, had personal experience with marihuana. Their comparisons with the material at issue, based on personal observations, did not involve inferences which the jury could have equally well made from the Witnesses' description absent the comparison to marihuana. *See generally* 7 J. Wigmore, Evidence § 1918 (3d ed. 1940). Nor, on the other hand, did the witnesses' testimony purport to be definite representations that the material was marihuana; we thus need not consider whether they would have been competent to express such a definite opinion. *Cf. People* v. *Kenney*, 30 N.Y. 2d 154, 282 N.E.2d 295 (1972). We think it was within the discretion of the court to have allowed the comparisons that were made.

The more basic question is whether, absent a report of laboratory analysis, there was ample evidence to support findings that the material was marihuana. We believe there was. The circumstantial and direct evidence when added together was exremely strong. This is not a case where the nature of a drug is sought to be established merely by a naive subject's reaction to a puff or two on a cigarette. It was testified that the parties, including Honneus, constantly spoke of the material as "marihuana" or "grass". The sole object was to purchase and distribute marihuana. There was extensive direct evidence of Honneus' negotiations with sellers in Jamaica resulting in the purchase of what Honneus plainly believed to be marihuana. The same substance was later resold in Massachusetts at prices of $175-$250 a pound and Honneus admitted it was "grass" in conversations. The material was smoked, produced a high, and had the outward appearance of marihuana.

We need not consider whether in different cases the absence of a specific and conclusive laboratory report would be fatal. Much depends on the totality of the evidence. A user's report, standing alone, might in some cases be a shaky reed, but that question is not before us. The evidence here was compelling that the substance was marihuana; indeed, barring an unlikely hoax fooling Honneus and his experienced associates, and those to whom they later sold, the substance had to be marihuana.

VI

Honneus makes one final complaint, namely, the court's failure to give promptly adequate limiting instructions with respect to hearsay conspiracy testimony. Early in the trial (as a precedent for a number of occasions thereafter) the Government asked a witness whether he had had a conversation with one of the defendants (in this instance Honneus) relating to the others. Counsel for another defendant objected. Before receiving the testimony the court instructed the jury that declarations affecting other alleged members of the conspiracy, not present at the time the statements were made, were not to be considered against them unless the jury was satisfied that they were in fact members of the conspiracy. The court failed, however, to instruct as to the second aspect of this matter, that the existence of the conspiracy and defendant's participation therein had to be established by independent non-hearsay evidence before the jury could consider against defendant a co-conspirator's hearsay statement. No counsel pointed out this omission, although later Honneus made a request —of an incorrect nature—as to the first aspect. The court did not cover the second aspect until the charge, and Honneus says that this was too late. To sustain this contention he must show plain error. F. R. Crim. P. 52(b).

The limiting instruction that the court did give initially is perhaps the more important of the two conditions. *Cf.*

Lutwak v. *United States*, 344 U.S. 604, 618-19 (1953). The other, however, is of importance as well. It is to be borne in mind that a jury has no experience in, or presumably knowledge of, the hearsay rule. Unguided, it would be most natural for the jury, in endeavoring to ascertain whether the defendants were in fact members of the conspiracy, to consider all evidence that apparently bore thereon. We must agree with *United States* v. *Apollo*, 476 F.2d 156, 163 (5th Cir. 1973), where the court said that there is a "minimum obligation on the trial judge in a conspiracy case in which extrajudicial statements of alleged co-conspirators are proffered to give a cautionary instruction on the limited uses of hearsay testimony, explaining clearly to the jury *the requirement that the conspiracy itself* and each defendant's participation in it *must be established by independent non-hearsay evidence* which must be given either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony." [Emphasis added.]

No previous case in this circuit has established that it may ever be plain error not to charge, a priori, on this second aspect. Moreover, in the present case the independent non-hearsay evidence tying Honneus to the conspiracy was adequate by any standard. We thus do not find plain error. The *Apollo* rule should, however, be observed in conspiracy cases hereafter tried in this circuit. Failure to do so will result in reversal in any case where we believe the omission to have affected substantial rights.

We affirm the judgment of the district court except for the separate concurrent sentences under Counts 1, 3, and 5. We vacate those sentences and remand the case for sentencing upon any one of the three conspiracy counts the United States may select, and for dismissal of the other two conspiracy counts.

So ordered.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 74-1112

UNITED STATES OF AMERICA,

APPELLEE,

v.

GEOFFREY HONNEUS,

DEFENDANT, APPELLANT.

JUDGMENT

Entered December 24, 1974

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed except for the separate concurrent sentences under Counts 1, 3 and 5 which sentences are vacated and the cause is remanded with directions to sentence defendant on any one of the three conspiracy counts the United States may select, and to dismiss the other two conspiracy counts.

By the Court:

(s) DANA H. GALLUP

Clerk

[cc: Messrs. Klubock and Cohen.]

APPENDIX C

Supreme Court of the United States

No. A-603
GEOFFREY HONNEUS,
PETITIONER,
v.
UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 6, 1975.

(s) WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 23
day of January, 1975.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-972

GEOFFREY HONNEUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court improperly excluded proffered expert testimony concerning the different species of marihuana, and that the court erroneously restricted his cross-examination of government witnesses.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on six counts of an indictment charging him and five confederates[1] with various offenses arising out of their efforts to import and distribute marihuana, in violation of 18 U.S.C. 371 and 545, and 21 U.S.C. 841, 846, 952, and 963. Subsequently, petitioner's post-trial motion to dismiss count six (charging smuggling, in violation of 18 U.S.C. 545) was granted. Petitioner was sentenced to concurrent five-year prison terms on counts one, three,

[1]Co-defendant Arthur Davey was convicted on all counts; co-defendant Robert Billock was acquitted on all counts. Co-defendants Richard Thurlow, William Helliesen, and Richard Gray pleaded guilty prior to trial.

and five (conspiracy counts), and concurrent five-year prison terms on counts two and four (to be served consecutively to the sentence on the conspiracy counts) and was fined $5,000 on each count. The court of appeals, in a thorough opinion, affirmed, except for the sentences under counts one, three, and five, which it found to constitute a single conspiracy and as to which it remanded for resentencing (Pet. App. 30-47).

Evidence at trial established that petitioner met in April 1972 with Judith and David Dugdale and Robert Puffer and sought the services of Puffer's yacht and crew to smuggle marihuana from Jamaica into the United States. Puffer later agreed to the deal, and a fee was set (1 Tr. 14-18). In May 1972, petitioner met with Richard Thurlow, who agreed to travel with him to Jamaica and introduce him to sellers of large quantities of marihuana (1 Tr. 90-92).

That same month, the Dugdales, Puffer, and Arthur Davey provisioned Puffer's vessel at Duxbury Harbor, Massachusetts. The boat left Massachusetts on May 24, 1972, and arrived at West Palm Beach, Florida, on June 4, 1972 (1 Tr. 20-28). Davey and Thurlow came aboard the next day and designated a point off the Maine coast as the eventual off-loading site (1 Tr. 28). Following the arrival of petitioner and William Rowe, Thurlow, Rowe, Puffer, and petitioner flew to Jamaica (1 Tr. 32-34), where they made contact with marihuana wholesalers, arranged for delivery of the marihuana, and established a landing site for the boat (1 Tr. 35, 100-105). Thurlow then returned to Boston, and Puffer returned to Florida (1 Tr. 35, 108).

William Helliesen, Richard Gray, and Puffer set sail for Jamaica, arriving at Runaway Bay on June 14, 1972 (1 Tr. 36-37; 2 Tr. 19). Fifteen 75-pound sacks of marihuana and thirty 25-pound packages of marihuana were loaded aboard, and the vessel set sail with Puffer, Gray, Helliesen, and Rowe aboard (1 Tr. 37-41; 2 Tr. 19-22).

On June 28, 1972, the boat arrived at Martha's Vineyard, Massachusetts, where it put in for refueling. Puffer contacted petitioner to announce the arrival and arrange a meeting in Maine. Upon arrival at Casco Bay, Maine, the cargo was transferred to another vessel (1 Tr. 42-45; 2 Tr. 23-24).

Subsequently petitioner met with Helliesen on various occasions at which he stated that he paid Helliesen's fee from the proceeds of marihuana sales in the Boston area. Petitioner supplied marihuana to Helliesen and Puffer, representing it to be from the Jamaica trip (1 Tr. 48-50; 2 Tr. 28-33).

1. Petitioner contends that the district court erred in excluding the testimony of his expert witness that marihuana may exist in any of three distinct species of the Cannabis plant, thereby preventing him from making out as a defense the government's failure to prove the substance in question was derived from Cannabis sativa L., the plant defined as marihuana in 21 U.S.C. 802(15). Such defense has been rejected as legally irrelevant by every federal court of appeals that has considered it.

In *United States* v. *Moore*, 446 F. 2d 448, 450 (C.A. 3), certiorari denied, 406 U.S. 909, the court stated:

> Cannabis indica is the name given to Cannabis sativa L. grown in India. * * * We agree with the District Court that "Congress intended the inclusion of the indica variety within the definition of marihuana as set forth in 26 U.S.C. §4761(a)."

And in affirming the district court's denial of a defense offer to prove marihuana polytypal, the court in *United* States v. *Rothberg*, 480 F.2d 534, 536, (C.A. 2), certiorari denied, 414 U.S. 856, stated:

> The most that the proffered proof could have established was that at the time of trial there was some and perhaps growing botanical opinion that Cannabis is polytypal and that a distinction

> can be made between Cannabis Sativa L. and Cannabis Indica Lam. * * * [U]p to the time of the offense, there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marihuana * * *. See *Leary* v. *United States*, 395 U.S. 6, 50 * * *. Whether this is scientifically exact or not, the statute provided at the time of the offense a sufficient description of what was intended to be prohibited to give notice to all of the illegality of appellant's actions.

Accord, *United States* v. *Kinsey*, 505 F. 2d 1354 (C.A. 2).

Other courts of appeals that have considered the issue have reached like conclusions. *United States* v. *Walton*, C.A. D.C., No. 74-1790, decided January 23, 1975; *United States* v. *Gaines*, 489 F. 2d 690 (C.A. 5); *United States* v. *Burden*, 497 F. 2d 385 (C.A. 8); *United States* v. *King*, 485 F. 2d 353 (C.A. 10).[2] The fact that certain district courts and the Superior Court for the District of Columbia have reached different conclusions does not warrant review by this Court.

2. Petitioner also claims that the trial court committed reversible error by improperly restricting the cross-examination of certain government witnesses. Defense counsel's attempt to inquire, on cross-examination of the accomplice Helliesen, a government witness, as to attempts by Helliesen to get $10,000 for keeping quiet, was prevented by the district court's ruling that the matter lay outside the scope of direct examination (2 Tr. 34-36, 127-132).

The court of appeals held that, under *Alford* v. *United States*, 282 U.S. 687, and *Smith* v. *Illinois*, 390 U.S. 129, the court should have permitted counsel to inquire

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[2]The same contention is made in the pending petition for certiorari to review a judgment of the Fifth Circuit in *Ford* v. *United States*, No. 74-838.

into the alleged bribe attempt in order to impeach the witness's credibility (Pet. App 37). It reasoned, however, that the error was harmless, since Helliesen had previously denied being involved in such improper solicitation, since the intermediary through whom he purportedly had acted, Martha Snyder, had been excused from testifying after invoking her privilege against self-incrimination, and since in any event Helliesen's testimony was strongly corroborated by other evidence and testimony in the case (Pet. App. 38-39). We believe the court of appeals was correct in its assessment of these matters and rely on its opinion (Pet. App. 36-40).

Petitioner also contends that the trial court improperly disallowed cross-examination of accomplice Thurlow as to alleged prior treatment for a nervous breakdown and admission to a Miami hospital for that reason. The evidence was properly rejected by the district court on the ground that petitioner failed to produce a hospital record or other evidence that the purported nervous breakdown was not so remote that it lacked relevance (Pet. App. 39-40), and the court of appeals correctly rejected petitioner's argument on this point (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

DOJ-1975-04